

1 Law Offices of Samuel A. Sue
2 SAMUEL A SUE, SBN 201817
3 310 Third Avenue, B-1
4 Chula Vista, CA 91910
5 Tel: 619-475-4368
6 Fax: 619-475-5180
7 ATTORNEY FOR MICHAEL A. TAIBI

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10
11 UNITED STATES OF AMERICA

12
13 Plaintiff,

14 v.

15 MICHAEL A. TAIBI

16 Defendant
17

CIVIL CASE NO. 10CV2250

DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT

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20 Defendant, Michael A. Taibi, by and through its counsel, Samuel A. Sue, and
21 opposes Plaintiff's Motion for Summary Judgment with respect to the claims in the
22 complaint (Doc. No. 1) filed on November 10, 2010.

23 BACKGROUND

24 This case involves a federally insured loan obligation purportedly entered into by
25 Michael A. Taibi. The loan was allegedly contracted between Mr. Taibi and the Citibank
26 of Rochester, New York, though this contract has never been produced by the United
27 States, Citibank or any of the parties ever seeking its enforcement.

1 The facts are laid out in Defendant's supporting declaration attached hereto.
2 Plaintiff incorrectly suggests that the original loan was in April 1993. Defendant
3 commenced law school education in August 1989, at which time Defendant recalls
4 entering into a promissory note for the original student loans. In April 1993, Plaintiff
5 alleges Defendant consolidated these loans with Citibank, for which Defendant signed a
6 promissory note. However, this promissory note by its language states specifically that
7 Defendant was to receive a Disclosure Statement with information concerning the actual
8 terms of the notes which are the subject of Plaintiff's case. Section IV of the Loan
9 Consolidation Application and Promissory Note, which Plaintiff bases the underlying
10 Complaint and subsequent Motion for Summary Judgment upon, specifically states in
11 pertinent part the following: "I, the undersigned borrower, promise to pay to you or your
12 order a sum certain equal to the loan amount **as identified in my Disclosure**
13 **Statement and Repayment Schedule which will be provided to me...**(emphasis
14 added)." The promissory note further states in pertinent part: "**In the event the**
15 **Disclosure Statement conflicts with any information on the Application and**
16 **Promissory Note, the Disclosure Statement will apply**" (emphasis added). Plaintiff
17 has not provided this Disclosure Statement and Repayment Schedule at any time
18 during the pendency of this case, and Defendant does not recall ever receiving such a
19 document.

20 Additionally, Section V of the Loan Consolidation Application and Promissory
21 Note which is "to be completed by Citibank," was to contain the Anticipated Distribution
22 Date, First Payment Due Date, New Loan Balance, Terms, and Rate, as suggested by
23 the captions contained within this section. However, none of this information was filled
24 in as required, and the actual terms of the promissory note do not exist, and have not
25 been provided by Citibank or Plaintiff, or anyone else who has held this alleged Note.
26 Plaintiff alleges that the interest rate per annum is 9%; however, the Loan Consolidation
27 Application and Promissory Note does not provide any terms of a contract, including but
28

1 not limited to the total amount of interest per annum to be charged or the total amount of
2 the loan.

3 Furthermore, through previous counsel, Defendant has requested numerous
4 times from USA Funds, since June of 2000, a bill of particulars with respect to the
5 underlying loans and the promissory note of Citibank. Defendant has never been
6 provided such a bill of particulars specifically identifying my payment history. Plaintiff
7 alleges that Defendant defaulted on the promissory note and promise to pay in March of
8 1998; however, Plaintiff does not provide any of the payments Defendant made towards
9 this loan, not even at least for the period of inception in April, 1993, to the time
10 Defendant supposedly defaulted in 1998, a total of five years. Plaintiff submits a
11 Certificate of Indebtedness created by the U.S. Department of Education that suggests
12 the holder of the loan "credited \$0.00 to the outstanding principal owed on the loan," not
13 that no payments were ever made, because no payment history for Defendant's
14 account can be provided by Plaintiff.

15 Mr. Taibi never received the Disclosure Statement nor has any party in this
16 proceeding or any party allegedly claiming a loan to Mr. Taibi produced such Disclosure
17 Statement.

18 II

19 ARGUMENT

20 Summary Judgment is only appropriate if "there is no genuine issue as to any
21 material fact and that the moving party is entitled to judgment as a matter of law". Fed.
22 R. Civ. P. 56(c). The party seeking summary judgment bears the initial burden of
23 demonstrating no genuine issue of material fact exists. Celotex Corp. V. Catrett, 477
24 U.S. 317,232 (1986).

25 The court must view evidence in the light most favorable to the non-movant party
26 and must draw all reasonable inferences in the non-movant's favor. Clicks Billiards Inc.
27 v. Sixshooters Inc. 251 F. 3d 1252, 1257 (9th Cir. 2001).

Because there is no federal common law the federal courts look to the law of the individual states to determine the substantive law to follow regarding many types of cases. *Erie R. Co. v. Thomkins* 1938, S. Ct. 817, 822. This is true of contract law, in which a federal court in California with all parties domiciled in the state would follow California contract law. To make out a cause of action for breach of contract in California one of the requirements is the pleading of a contract as well as the terms of such contract. California Civil Procedure 430.10(g). Plaintiff cannot recover without first establishing an absolute breach of the terms of the contract on the part of defendant. (*Hutchinson v. Wetmore*, 2 Cal. 310; 56 Am. Dec. 337; *Jones v. Post*, 6 Cal. 102; *Purdy v. Bullard*, 41 Cal. 444; *Cox v. McLaughlin*, 63 Cal. 196; Bishop on Contracts, secs. 682 et seq.; *Clark v. Baker*, 5 Met. 452; 2 Parsons on Contracts, sec. 523; *Marshall v. Jones*, 11 Me. 54; 25 Am. Dec. 260; *Ala. Gold Life Ins Co. v. Garmany*, 74 Ga. 51.) The covenants of the contract are mutual and dependent, and in order to enable respondent to maintain this action, it must be shown that he performed, or offered to perform, all the terms and conditions of the contract within the time specified. (*Hill v. Grigsby*, 35 Cal. 656; *S. S. & L. S. v. Hildreth*, 53 Cal. 721; *Englander v. Rogers*, 41 Cal. 420; *Bohall v. Diller*, 41 Cal. 532; *Kelly v. Mack*, 45 Cal. 303; *Shinn v. Roberts*, 1 N. J. L. 435; 43 Am. Dec. 636.)

After discovery in this case the United States of America has failed to show the terms of the contract of which Mr. Taibi is allegedly in breach. (See supporting Declaration of Samuel A. Sue) They have provided a 1993 Loan Consolidation Application and Promissory Note that references earlier loans that Mr. Taibi was to have contracted for, yet they do not produce these loans from which the Loan Consolidation Application and Promissory Note was based. More damagingly, the Loan Consolidation Application and Promissory Note specifically states on it, in bold letters, "I the undersigned borrower, promises to pay to you or your order a sum equal to the loan amount as identified in my Disclosure Statement and Repayment Schedule which will be provided to me at the time my former creditors have discharged my obligations on

1 the loans selected for consolidation. In the event the Disclosure Statement conflicts with
2 any information on the Application and Promissory Note, the Disclosure Statement will
3 apply". Such Disclosure Statement was never sent to Mr. Taibi, nor was it produced by
4 the United States in discovery in this action. For example, In a case involving a sale of
5 real estate the Supreme Court has held that the material factors to be ascertained from
6 such a contract are: the seller, the buyer, the price to be paid, the time and manner of
7 payment, and a sufficient description of the subject property so it may be identified. (
8 King v. Stanley, 32 Cal.2d 584, 589 [197 P.2d 321].) Contract terms are essential to the
9 formation of the contract and if the Defendant in this matter was not advised of them he
10 cannot be held in breach. As such the United States has not met its burden of pleading
11 a contract or its terms

12 In order for Plaintiff's to enforce the alleged contract in this matter they must have
13 performed all conditions precedent to the contract. In pleading the performance of
14 conditions precedent in a contract, it is not necessary to state the facts showing such
15 performance, but it may be stated generally that the party duly performed all the
16 conditions on his part. (Code Civ. Proc., sec. 457.) As to the form of allegation showing
17 performance, an allegation that the plaintiff has "fully performed," on his part, all
18 conditions of the contract, is sufficiently explicit. (California Steam Nav. Co. v. Wright, 6
19 Cal. 258; 65 Am. Dec. 511; [***6] People v. Jackson , 24 Cal. 630; People v. Holladay,
20 25 Cal. 303; Rhoda v. Alameda Co., 52 Cal. 350; Himmelman v. Danos, 35 Cal. 441-
21 448; Ferrer v. Home Mutual Ins. Co., 47 Cal. 416-431; Griffiths v. Henderson, 49 Cal.
22 566-570; Blasingame v. Home Ins. Co., 75 Cal. 633-638; Moritz v. Lavelle, 77 Cal. 10-
23 12; 11 Am. St. Rep. 229; Cowan v. Phoenix Ins. Co., 78 Cal. 181; Bliss on Code
24 Pleading, sec. 301, ed. of 1879.) In this case they failed to provide the disclosure
25 statement which is essential to Defendant's ability to perform. Hence Plaintiff's may not
26 enforce the contract.

27 Without a contract in this case or its terms, Plaintiff's Motion must fail. The Court
28 should deny the Motion.

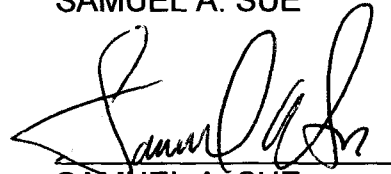
III

CONCLUSION

As set forth above and in the accompanying declaration and exhibits, Plaintiff's motion should be denied. For all the foregoing reasons, Defendant requests that the court enter judgment in its favor on all the claims of the complaint.

Dated: 2/1/12

Respectfully submitted,
SAMUEL A. SUE

A handwritten signature in black ink, appearing to read 'Samuel A. Sue', written over a horizontal line.

SAMUEL A. SUE
Attorney for Michael A. Taibi

Samuel A. Sue, Esq., SBN #201817
LAW OFFICES OF SAMUEL A. SUE
310 Third Avenue, Ste. B-1
Chula Vista, CA 91910
Telephone: (619)475-4368
Facsimile: (619)475-5184

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL A. TAIBI,

Defendant.

Civil No. 10CV2250-JLS (CAB)

DEFENDANT'S DECLARATION IN
OPPOSITION OF GOVERNMENT'S
MOTION FOR SUMMARY JUDGMENT

I, Michael A. Taibi, hereby submit my declaration in opposition to Plaintiff's Motion for Summary Judgment:

1. I am the Defendant in the above entitled action and I have personal knowledge of the following. If called to testify, I am able to competently testify thereto to the contents contained within this Declaration.

2. Plaintiff incorrectly suggests that the original loan to me was in April 1993. I commenced my law school education in August 1989, at which time I recall entering into a promissory note for the original student loans. In April 1993, Plaintiff alleges I consolidated these loans with Citibank, for which I signed a promissory note. However, this promissory note by its language states specifically that I was to receive a Disclosure Statement with information concerning the actual terms of the notes which are the subject of Plaintiff's case. Section IV of the Loan Consolidation Application

1 and Promissory Note, which Plaintiff bases the underlying Complaint and subsequent Motion for
2 Summary Judgment upon, specifically states in pertinent part the following: "I, the undersigned
3 borrower, promise to pay to you or your order a sum certain equal to the loan amount **as identified in**
4 **my Disclosure Statement and Repayment Schedule which will be provided to me...**(emphasis
5 added)." The promissory note further states in pertinent part: "**In the event the Disclosure Statement**
6 **conflicts with any information on the Application and Promissory Note, the Disclosure Statement**
7 **will apply**" (emphasis added). Plaintiff has not provided this Disclosure Statement and Repayment
8 Schedule at any time during the pendency of this case, and I do not recall ever receiving such a
9 document.

10
11 3. Additionally, Section V of the Loan Consolidation Application and Promissory Note
12 which is "to be completed by Citibank," was to contain the Anticipated Distribution Date, First Payment
13 Due Date, New Loan Balance, Terms, and Rate, as suggested by the captions contained within this
14 section. However, none of this information was filled in as required, and the actual terms of the
15 promissory note do not exist, and have not been provided by Citibank or Plaintiff, or anyone else who
16 has held this alleged Note. Plaintiff alleges that the interest rate per annum is 9%; however, the Loan
17 Consolidation Application and Promissory Note does not provide any terms of a contract, including but
18 not limited to the total amount of interest per annum to be charged or the total amount of the loan.

19 4. Furthermore, through previous counsel, I have requested numerous times from USA
20 Funds, since June of 2000, a bill of particulars with respect to the underlying loans and the promissory
21 note of Citibank. I have never been provided such a bill of particulars specifically identifying my
22 payment history. Plaintiff alleges that I defaulted on the promissory note and promise to pay in March
23 of 1998; however, Plaintiff does not provide any of the payments I made towards this loan, not even at
24 least for the period of inception in April, 1993, to the time I supposedly defaulted in 1998, a total of five
25 years. Plaintiff submits a Certificate of Indebtedness created by the U.S. Department of Education that
26 suggests the holder of the loan "credited \$0.00 to the outstanding principal owed on the loan," not that
27 no payments were ever made, because no payment history for my account can be provided by Plaintiff.
28

/ s / Michael A. Taibi

Defendant, MICHAEL A. TAIBI

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13 Plaintiff,

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15 MICHAEL A. TAIBI

16 Defendant
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CIVIL CASE NO. 10CV2250

DECLARATION OF SAMUEL A. SUE IN
SUPPORT OF DEFENDANT'S MOTION
TO DISMISS.

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21 I, Samuel A. Sue, hereby submit my declaration in support of Defendant's
22 Motion for Summary Judgment, as follows:

23
24 1. I am attorney for Defendant in the foregoing action and I have personal
25 knowledge of the following. If called to testify, I am able to competently testify thereto to
26 the contents contained within this Declaration.
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1 2. I have reviewed all documents submitted by Plaintiff in this action, both in
2 the original complaint and in subsequent discovery, and Plaintiff has not provided the
3 disclosure statement mentioned in the consolidation presented in Plaintiff's Complaint,
4 nor has Plaintiff submitted any evidence such disclosure statement ever existed or was
5 provided to Defendant.
6

7
8 I declare under penalty of perjury that the foregoing is both true and correct to the
9 best of my knowledge and belief. Executed this 1st day of February, 2012, in San
10 Diego, CA.
11

12
13 Dated: 2/1/12

14 Respectfully submitted,
15 SAMUEL A. SUE

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17 SAMUEL A. SUE
18 Attorney for Michael A. Taibi
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